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IN THE

Supreme Court of the United States

October Term, 1960

No. 41

MARIA REY,

Petitioner,

vs.

PENN SHIPPING CO., INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI AND APPENDIX

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI

Opinions Below

The opinion of the District Court is unreported but a copy thereof is set forth in the appendix annexed hereto. The opinion of the United States Court of Appeals for the Second Circuit is officially reported in 277 F. 2d 905.

Jurisdiction

It is not disputed that there is jurisdiction under Title 28 U. S. C., Section 1254 (1). However the petition fails to establish that there exists any of the grounds for granting the writ set forth in Rule 19 of the Revised Rules of this Court.

Statement

This litigation concerns an attempt by a boarding house keeper to recover from a shipowner a board bill which a seaman had incurred but had not paid while living in her establishment. This board bill was incurred after the debtor seaman had been hospitalized for a condition which it was claimed was incurred or manifested itself during the debtor's seaman's service aboard a vessel owned by the respondent.

Prior to the subject action, however, the debtor seaman had instituted an independent action in his own right, in the Municipal Court of the City of New York, for the purpose of recovering damages on account of injuries which he claimed he sustained while employed aboard respondent's vessel. That action was then duly tried. On December 4, 1958, the Trial Court sitting, as the trier of the facts, rendered a decision dismissing the claim for damages and holding that the debtor seaman was entitled to maintenance only for the period from May 24, 1958 to June 30, 1958 in the amount of $228.00 (Certified Record, pp. 12, 15).

Thereafter on May 1, 1959 (Certified Record, p. 1), or almost six months later, petitioner commenced this action. Under the guise of a purported reliance on the duty of a shipowner to provide a sick or injured seaman with needed medical care and maintenance, petitioner seeks the value of the board and lodging which she claims she furnished to the debtor seaman during the period from May 25, 1958 to November 30, 1958, despite the fact that in the action which the seaman brought in his own right, there has been an adjudication that the shipowner's duty to provide maintenance ceased as of June 30, 1958 and an award has been made to the debtor seaman covering his maintenance for the period from May 24, 1958 to June 30, 1958.

The debtor seaman has appealed from the decision in the action which he brought in his own right and that appeal is pending.

The District Court dismissed the petitioner's action on the ground that it was insufficient in law. It held that the petitioner had no claim for the board and lodging against the respondent but that her claim lay against the debtor seaman.

On the authority of this Court's decision in *Aetna Life Insurance Co.* v. *Middleport* (1887), 124 U. S. 534, and the decision of the District Court in *Trafford Hall* (E. D., N. Y. 1926), 1926 A. M. C. 1038 (not otherwise reported), it rejected the decision of the District Court in *Methodist Episcopal Hospital* v. *Pacific Transport Co.* (D. C., N. D., Cal., 1920), 3 F. 2nd 508, on which petitioner seeks to base this petition and held that the theory of subrogation had no application where petitioner, under no obligation to do so, voluntarily extended credit to the debtor seaman.

The Court of Appeals affirmed the judgment of the District Court (Certified Record, pp. 23-26).

ARGUMENT

I

Under the facts of this case, the interpretation of the law by the Court below was correct.

There are no issues in this case which warrant review by this Court on certiorari. Petitioner's contention that the decision of the Court of Appeals is in conflict with an old District Court decision affords no valid basis for certiorari. That decision was subsequently rejected by two District Courts. *Chen* v. *Ellerman Lines, Ltd.* (E. D.,

N. Y., 1926), 1926 A. M. C. 1038; *Hegsted* v. *Standard Transportation Co.* (1934), 1934 A. M. C. 190 (not otherwise officially reported), and, as the Court of Appeals pointed out, finds no basis either in precedent or law to sustain it.

In any event, the decision in *Methodist Episcopal Hospital* v. *Pacific Transport*, 3 F. 2nd 508, does not authorize a volunteer, who is under no obligation to provide services to a seaman, to collect for those services under the guise of enforcing a right which belongs exclusively to a seaman, and which properly figures in the seaman's own recovery. The judgment which the debtor seaman recovered in the action which he commenced in the Municipal Court of the City of New York, though on appeal, is res judicata. *Emery* v. *United States* (D. C., Pa., 1928), 27 F. 2nd 992; *Cohen* v. *Superior Oil Corporation* (3 Cir., 1937), 90 F. 2d 810, 811-812. It is final until reversed in an Appellate Court, or modified or set aside in the Court of its rendition *Deposit Bank* v. *Frankfort* (1903), 191 U. S. 499, 520. In fact under the facts of this case the very contention in support of which *Methodist Episcopal Hospital* v. *Pacific Transport*, 3 F. 2d 508, is offered by petitioner was rejected by the Court in that case. At page 508 the Court said:

> "It would be a defense to this action, if maintainable at all, to show that the assessment claimed had already been paid to the seaman * * *."

Thus since the right on the basis of which petitioner seeks to base her claim has been asserted by the debtor seaman against respondent and the question of whether or not he is entitled to enforce that right and the extent to which he can enforce it, will be determined in that action, petitioner's libel is insufficient in law and therefore was properly dismissed.

II

The shipowner's duty to provide maintenance to a seaman while receiving treatment of a curative nature is not a guarantee of his board bills.

This Court's decisions in *Farrell* v. *United States* (1948), 336 U. S. 511, and *Calmar S. S. Corporation* v. *Taylor* (1937), 303 U. S. 525, and Mr. Justice Story's opinion in *Harden* v. *Gordon*, 11 Fed. Cas. 480, No. 6047, as well as the Laws of Oleron, 30 Fed. Cas. 1174, afford no basis for converting a shipowner's duty to provide a seaman with maintenance, which duty applies only during the time the seaman is receiving treatment of a curative nature, *Farrell* v. *United States* (1948), 336 U. S. 511, into a guarantee of his bills for board and lodging no matter how and when incurred.

A Court of competent jurisdiction has found after trial in which the issues were sharply contested that the debtor seaman was not entitled to any maintenance other than for the period from May 24th, 1958 to June 30, 1958. Petitioner, on the other hand, asserts a claim for board and lodging covering the period from May 25, 1958 to November 30, 1958. The period of time embraced in petitioner's claim thus seeks recovery not only for the same period for which the debtor seaman obtained recovery, but for a period of time for which respondent has been held not liable under the law. The decisions referred to by petitioner sanction no recovery even by the seaman himself. The petition is, therefore, completely devoid of any merit as there is no basis in law on which the libel can be supported initially.

III

The right to maintenance is one that rests exclusively with the seaman and cannot be asserted by anyone who purportedly acts in reliance thereon and furnishes services to a seaman.

The right to maintenance and cure is one that is annexed to the employment relationship between the ship and the seaman without heed to any expression of the will of the parties. Since no agreement is competent to abrogate this right, *Cortes* v. *Baltimore Insular Line, Inc.* (1932), 287 U. S. 367, 371-372; *De Zon* v. *American President Lines* (1942), 318 U. S. 660, 667, no one other than a seaman possesses the right to enforce it. It exists solely for the benefit of the seaman and, as the Court of Appeals properly pointed out, petitioner's claim cannot be sustained either under the theory of creditor beneficiary, quasi contract or subrogation. To recover as a creditor beneficiary it is not enough that the right sought to be enforced may operate to petitioner's benefit. It must also appear that the parties intended to recognize the petitioner as the primary party in interest and as privy to the promise. *Pennsylvania Steel Co.* v. *New York City Ry. Co.* (2 Cir. 1912), 198 Fed. 721, 749; *Robins Dry Dock & Repair Co.* v. *Flint* (1927), 275 U. S. 303, 307.

There is no basis for a quasi contractual recovery because respondent will not be unjustly enriched since respondent remains liable to the debtor seaman for all expenses of board and lodging as imposed by law.

Nor is there any basis for a claim by petitioner by way of subrogation. Petitioner was in no way bound to dis-

charge the shipowner's liability to the debtor seaman. 4 Williston, Contracts, Sec. 1211 (Rev. Ed., 1936).

Accordingly petitioner's libel is utterly without foundation and was properly dismissed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully Submitted,

VICTOR S. CICHANOWICZ
Counsel for Respondent.

APPENDIX

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MARIA REY,

Plaintiff,

AGAINST

PENN SHIPPING CO., INC.,

Defendant.

MEMORANDUM

CASHIN, D.J.:

This is an action in admiralty for maintenance and cure by Maria Rey who extended credit for room and meals to Andres Galban. Respondent, Penn Shipping Co. Inc., upon whose vessel Galban was injured, has moved for "judgment on the pleadings" on three grounds:

"(1) This claim is not within the admiralty jurisdiction of this court.

"(2) That the libellant is estopped from alleging the claim in her libel as necessary parts thereof have been previously adjudicated.

"(3) That the claim does not state any basis for recovery by the libellant against the respondent."

The motion will be treated as an exception to the libel.

Galban sued respondent in the Municipal Court of the City of New York and was awarded $228 for maintenance and cure (24) for the period from May 24, 1958, to June 30, 1958, by Judge McCarthy on December 4, 1958. Galban has appealed this decision and this appeal is still pending

Libellant insists that she has a claim for maintenance and cure due to Galban. Libellant relies on *Methodist Episcopal Hospital* v. *Pacific Transport Co.*, 3 F. 2d 308 (D. C., N. D., Cal., 1929). In that case the libellant was a hospital which had treated a seaman injured on board respondent's vessel. The Court allowed recovery in that case, stating that it could see little difference if maintenance and cure were paid to the injured seaman or to the hospital. This court does not concur in that opinion.

Libellant has no claim against respondent but rather has a claim against the injured seaman. The theory of subrogation has no application in this case where libellant, under no obligation to do so, voluntarily extended credit to Galban. *Aetna Life Insurance Co.* v. *Middleport*, 124 U. S. 534 (1888); *Trafford Bell*, 1926 A. M. C. 1168 (E. D., N. Y., 1926).

In *Heasted, Adm.* v. *Standard Transportation Company*, 1934 A. M. C. 190 (S. D., N. Y., 1934), libellant tried to recover, in his individual capacity, money advanced for his deceased son's board, lodging, medical attendance and cure during the time deceased was under treatment after being injured on respondent's vessel. The court refused to follow *Methodist* v. *Pacific*, *supra*, stating that,

> "subrogation has no application to a mere gratuitous voluntary payment by one under no obligation to respond."

The court went on to find that the deceased administratrix could recover, in his representative capacity, for the maintenance and cure claim of the decedent which did not abate at his death.

Accordingly, the libel is insufficient in law, respondent's exception is sustained, and the libel is dismissed.

It is so ordered.

Dated, New York, N. Y., August 13th, 1959.

John M. Cashin
U. S. District Judge